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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD A. HECHENBERGER,
WILLIAM V. WILKEN,
and CHARLES W. RAMSEY,
Petitioners

vs.

WESTERN ELECTRIC CO., INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as WESTERN ELECTRIC SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC. and SOUTHWESTERN BELL TELEPHONE PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as SOUTHWESTERN BELL TELEPHONE SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, and RICHARD ROUSSELOT, Director, Division of Workers' Compensation, State of Missouri,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. WAS THE COURT OF APPEALS' FINDING OF MOOTNESS BASED ON RESPONDENTS' ABANDONMENT OF WRONGFUL BENEFITS INTEGRATION TOO SUMMARY WHEN COURT IGNORED IMPORTANT REMAINING ISSUES OF (a) FIDUCIARY REMOVAL FOR DUAL LOYALTY AND ADVERSARIAL REPRESENTATION PREVIOUSLY CONDEMNED IN *NLRB V. AMAX COAL CO.*, 453 U.S. 322 (1981) AND *SCNEIDER MOVING & STORAGE CO. V. ROBBINS*, ____ U.S. ____, 80 L.ED.2D 366 (1984), AND (b) DAMAGES RESULTING FROM DISCOURAGEMENT AND OTHER EXTRACONTRACTUAL DAMAGES, WHICH DAMAGE ISSUES THIS COURT WILL SOON ADDRESS IN MASSACHUSETTS MUTUAL LIFE INS. CO. V. RUSSELL, NO. 84-9?

2. EVEN THOUGH THREATS ARE ABANDONED AFTER CHALLENGE BY ERISA LAWSUIT, DOES A DISCOURAGED PLAN BENEFICIARY HAVE A CAUSE OF ACTION FOR ERISA PLAN ADMINISTRATORS' PRIOR THREATS TO WRONGFULLY INTEGRATE PLAN BENEFITS WITH STATE WORKER'S COMPENSATION BENEFITS, WHERE UPON ABANDONMENT BENEFICIARY IS THEN BARRED FROM PURSUING STATE CLAIM PREVIOUSLY ASSURED AS FUTILE?

3. WHERE ERISA PLAN ADMINISTRATORS THREATENED IN STATE PROCEEDINGS TO WRONGFULLY INTEGRATE ERISA PLAN BENEFITS WITH STATE WORKERS' COMPENSATION AWARDS, ARE PLAN BENEFICIARIES ENTITLED TO TRIAL TO RECOVER FOR LOSS OF INTEREST ON THE UNCONTESTED CREDIT AMOUNT AND RECOVER OTHER CONSEQUENTIAL DAMAGES SUCH AS LOST WAGES AND ATTORNEYS FEES INCURRED IN SUCH STATE PROCEEDING?

LIST OF PARTIES TO THE PROCEEDINGS

All parties are fully listed in the caption.

Petitioner Hechenberger is a Missouri employee of Western Electric Company, now renamed AT&T Technologies, Inc., and by reason of his employment was a participant in the respondent Western Electric Plan. Petitioners Wilken and Ramsey are Missouri employees of Southwestern Bell Telephone Company and by reason thereof participants in the respondent Southwestern Bell Telephone Company Plan. Both respondent plans are ERISA benefits plans covering employees in many states.

Respondent Richard Rousselot is the Director of the state agency administering the state workers' compensation programs. Mr. Rousselot originally intervened and was then subject to petitioners' cross-claim arising out of the activities of his agency's personnel.

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RICHARD A. HECHENBERGER,
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WESTERN ELECTRIC CO., INC., and WESTERN ELECTRIC PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as WESTERN ELECTRIC SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, SOUTHWESTERN BELL TELEPHONE CO., INC. and SOUTHWESTERN BELL TELEPHONE PLAN FOR EMPLOYEES' PENSIONS, DISABILITY BENEFITS AND DEATH BENEFITS, now also known in part as SOUTHWESTERN BELL TELEPHONE SICKNESS AND ACCIDENT DISABILITY BENEFIT PLAN, and RICHARD ROUSSELOT, Director, Division of Workers' Compensation, State of Missouri,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CITATIONS TO OPINIONS BELOW

The opinion of the three-judge panel of the Eighth Court of Appeals in this proceeding is reported at 742 F.2d 453. It is printed in Appendix A hereto, infra, pages A-1 through A-5. The order of the Court denying petitioners' Petition for Rehearing and for Rehearing En Banc is printed in Appendix B hereto, infra, page A-6.

The decision of the district court is reported at 573 F.Supp. 71.

JURISDICTIONAL STATEMENT

The judgement of the Court of Appeals for the Eighth Circuit was entered August 28, 1984. A timely petition for rehearing or rehearing en banc was denied on October 12, 1984. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved in this case are Sections 2(b), 404(a)(1)(A)(i) and (D), 406(a)(1)(D) and (b)(2), 502(a)(1)(B) and (3) and 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§1001, 1104, 1106, 1132 and 1144. The principal ERISA section relied upon is Section 502 which reads

> (a) A civil action may be brought—
>
> (1) By a participant or beneficiary—
>
> (B) . . . to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .
>
> (3) By a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;"

The balance of the ERISA provisions are printed in Appendix C, infra, pages A-7 through A-9.

STATEMENT OF CASE

Petitioners are workers of respondent employers, who received payment from respondent ERISA benefit plans for their temporary absences from work due to injuries. Respondents Southwestern Bell and Western Electric administer their similarly worded ERISA benfit plans through their unilaterally appointed Employee Benefit Committees ("EBC"), consisting of high ranking executives of respondents.

These same EBC's also take active part on behalf of the respondent employers in the defense of the petitioners' state workers' compensation claims for those same injuries, in which adversarial proceedings plan questions arise. The EBC-directed personnel assert positions on those plan questions to favor only the employer. The questions raised by respondents in such adversarial state proceedings include integration of plan benefits paid for temporary absences, with state "permanent partial disability" ("PPD") entitlements and with state temporary total disability ("TTD") entitlements. Entitlement to PPD awards under state law does not require absence; payment is usually considered to be for anticipated future diminution in lifetime earning capacity as a result of the residual injury. TTD entitlements are for absences while recuperating from the injury. Petitioners suffered residual injuries.

This dispute is over respondents' total conduct with regard to what the Eighth Circuit viewed as integration of ERISA plan benefits with state workers' compensation awards. Appendix A, p. A-2 n.1. Integration with PPD awards was taking place only in Missouri during the pendency of the instant action. As a result of discovery petitioners further contended respondents concealed plan history which revealed the plan did not permit integration with workers' compensation benefits, and certainly not with PPD awards to which petitioners claimed entitlement.

Respondents announced abandonment of their integration practice with state PPD awards a year and a half after the ins-

tant suit was filed, shortly before the scheduled trial date. Respondents did not abandon, however, their dual loyalties in otherwise carrying out the plan and interpreting it, but instead continued to insist that notwithstanding plan history prohibiting integration they could reinterpret the plan whenever they chose solely for the purpose of reducing the employers' costs. Moreover, respondents as plan fiduciaries, through their unilaterally appointed EBC's, did not abandon their state workers compensation practice of representation of employer interests adverse to beneficiaries as to benefit plan matters.

The district court permitted no question as to respondents' sincerity in abandoning and held no hearing. It granted summary judgment, finding the limited abandonment of integrating plan benefits with state PPD awards mooted the instant case on all issues presented since none of the petitioners had in fact suffered a "reduced" state award before abandonment. Respondents' prior threats were held non-actionable.

On appeal the Eighth Circuit Court of Appeals affirmed the district court. The Court of Appeals found no justiciable controversy is created as long as respondents announced abandonment before the threatened integration actually "reduced" the state award to petitioners, without examining into the issues of dual loyalties and the adversarial conduct by plan fiduciaries and the consequences of that conduct (remedies). It made no finding or comment on dual loyalties of those administering the plan, on fiduciary representation of interests adverse to beneficiaries as to plan issues on concealment, on rights of discouragees, on petitioners' evidentially-established extracontractual damages or on petitioners' claim for fiduciary removal.

JURISDICTION OF FEDERAL COURT

The jurisdiction of the federal court was invoked pursuant to 29 U.S.C. §§185(a) and 1132(a). (Section 502 of ERISA and Section 301 of the NLRA.)

REASONS FOR ALLOWANCE OF THE WRIT

I. Question: Summary Affirmance Based On Limited Abandonment Insufficient For Presented And Factually Supported Issues Of (a) Dual Loyalties And (b) Damages.

This case represents a multitude of dual loyalty problems. No hearing on that issue was ever allowed. In dismissing on respondents' respective summary judgment motions, the district court and then the Court of Appeals limited sole consideration to the fact of abandonment of integration threats against state PPD awards not yet fully carried out as to petitioners.

Petitioners submit mootness is a "last-resort" doctrine, not to be used when there are outstanding dual loyalty and adversarial conduct trust questions this Court has several times recognized, as in *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330-334 (1981), and more recently in *Schneider Moving & Storage Co. v. Robbins*, ____ U.S. ____, 80 L.Ed.2d 366 (1984). While the Eighth Circuit would clearly classify respondents in their role of plan administrators as ERISA-defined fiduciaries, *Monson v. Century Mfg. Co.*, 739 F.2d 1293, 1303 (8th Cir. 1984), in the instant case the Court of Appeals chose not to deal with dual loyalty and adversarial representation questions. Petitioners submit that the decision of the Court of Appeals reveals it was too summary in dealing with the fiduciary questions for which this Court demanded careful consideration and sensitivity in *Amax Coal, supra,* and *Schneider Moving, supra.*

Under the circumstances, this is a case on which to grant certiorari or remand to the Eighth Circuit for more detailed consideration in light of *Amax Coal, supra,* and *Schneider Moving, supra.* If the Court is not prone to presently grant the writ or remand for further consideration, petitioners submit that this Court hold this petition for decision in light of this Court's recent grant of review in *Massachusetts Mutual Life Ins. Co. v. Russell,* No. 84-9, 53 Law Week 3235, which case raises some of

the same reasons for awarding non-benefit damages arising out of fiduciary misconduct, as is presented by the instant case.

It may be that the Court of Appeals rejected careful consideration of the dual loyalty and other fiduciary misconduct questions petitioners presented because of its finding that the respondents integrated only after they first secured "approval" by the state court in *Strohmeyer v. Southwestern Bell Telephone Co.*, 396 S.W.2d 1 (Mo.App. 1965). Appendix A, p. A-3. But the evidence petitioners presented in opposition to summary judgment reveals that the state court decision was tainted by the same dual loyalty/adversarial representation misconduct presented in opposition to summary judgment in this instant suit.

In the instant case, using the federal discovery rules, petitioners discovered various historical documents previously concealed from workers. This history revealed:

1. The original anti-duplication provisions of the Bell System benefit plans, of which the respondent plans were a part, were not drafted to prohibit duplication of plan benefits with workers compensation benefits.[1] No injured worker ever had to elect whether to take plan benefits or work comp benefits. The "election" provision the state court in *Strohmeyer, supra,* stressed, was never intended to compel the beneficiary to choose between plan benefits and worker's compensation benefits.

2. In 1941, some of respondents' own attorneys pointed out plan ambiguity in making comparisons under the offset provision as previously written,[2] controverting the

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[1] Exhibit 3, pages 2-3. Exhibits and testimony cited in these footnotes were part of the clerk's record ("CR") on appeal to the Eighth Circuit under 8th Cir.R.7(e).

[2] Exhibit 82, pages 18-25.

"specific negation" of both plan benefits and PPD awards that respondents later successfully convinced the state court in *Strohmeyer, supra,* and other cases, to find.

3. In 1942 a Bell System study committee recognized that plan benefits paid for temporary absences were of a different character and did not carry out the same purposes as state PPD benefits,[3] leading to an official AT&T interpretation that no offset for plan benefits against PPD awards was to be taken.[4] The respondents then committed themselves to that system-wide no-offset plan interpretation.[5]

4. In 1946 the Bell System companies, including respondents, "froze" that no-offset interpretation by amending the offset provision to prohibit offsets unless the benefit is of "the same general character." The amendment was proposed for the express reason of changing the provision as it previously read to meet the way that the Bell benefits plans were then being administered—no offset against PPD awards.[6]

Notwithstanding this history, to secure state "approval" of the integration practice, in the mid-1960's the Southwestern Bell respondents misrepresented to the Missouri judiciary that the plan provisions since 1913 had always been the same and that the anti-duplication provisions of the plan had been designed to prevent the injured worker from receiving both plan payments and workers' compensation benefits. Those repondents concealed from the Missouri judicial system the plan history discovered in this instant proceeding. The Missouri courts ac-

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[3] Exhibit 40, pages 5-7.

[4] Exhibit 43.

[5] Exhibits 29 through 32 and 75.

[6] Exhibit 46, page 1.

cepted respondents' presentation that the plan had always "expressly negated" both plan benefits and workers' compensation PPD awards. *Strohmeyer v. Southwestern Bell Telephone Co., supra,* 396 S.W.2d at 7; *Evans v. Missouri Utilities Co.,* 671 S.W.2d 812, 814 (Mo. App. 1984).

Once having obtained *Strohmeyer, supra,* the Southwestern Bell respondents thereafter integrated in Missouri in reliance thereon. Notwithstanding their fiduciary role as plan administrator they continued to conceal the actual plan history from the Missouri courts and from beneficiaries until discovered in the instant proceeding by petitioners' extensive discovery. Some ten years after *Strohmeyer, supra,* and fully cognizant of the plan's true history and system-wide interpretation and practice not to offset,[7] the Western Electric respondents decided to follow the Southwestern Bell respondents' integration practice in Missouri.

Only after petitioners' discovery of the concealed plan history in the instant case and after the district court had scheduled class hearing and trial dates, on June 1, 1983 the Western Electric repondents moved for summary judgment. They announced the threats to integrate plan benefits with PPD awards in Missouri was being abandoned forthwith, but they claimed their fiduciaries' 1981 plan (re)interpretation of the existing plan language gave them the right to integrate against PPD awards in all states under ERISA preemption.[8] At the time of their decision to abandon, the Western Electric respondents did not claim orally or in any document filed in the district court any knowledge that the Missouri legislature was about to change the

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[7] Exhibit 29, pages 5-7.

[8] CR, pages 84, 93-94. Respondents' insistence on the continuing legality of their integration practice provides additional reason to question mootness. *Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 43 (1944); *Allee v. Medrano,* 416 U.S. 802 (1974); *United States v. Concentrated Phosphate Export Ass'n.,* 393 U.S. 199 (1968).

statute to prohibit all integration with workers' compensation awards. The Court of Appeals cited the statutory change as meaningful, albeit acknowledging ERISA pre-emption banned such a flat statutory prohibition by its citation to *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). Appendix A, p. A-3.

Shortly after the Western Electric's abandonment announcement the parties learned the Missouri legislature amended state law to prohibit integration for all injuries occurring on or after September 28, 1983. The Governor signed the legislative amendment July 28, 1983. On August 25 the district court found the threat made to petitioner Hechenberger did not create any justiciable case or controversy since Hechenberger's worker's compensation claim had not then been reduced by the state agency, and that the Western Electric respondents' abandonment announcement made his case moot. Summary judgment was granted. Two days following this ruling, on the eve of the rescheduled class certification hearing, the Southwestern Bell respondents followed Western Electric's lead, announcing abandonment of the offset previously asserted against its injured Missouri workers' PPD claims while they too claimed the continuing "right" as plan fiduciaries to integrate against PPD and TTD awards under the terms of the benefit plan. The district court allowed no contest or discovery into the motives behind the abandonment and adopted its prior ruling, granting summary judgment in favor of all respondents.

Besides fiduciary concealment and the conduct described above, there was other evidence of dual loyalties cited to the lower courts. When respondents first "reinterpreted" the plan long after the 1946 "freezing" amendment, their decision to allow the integration in Missouri was made without any fiduciary considerations imposed under ERISA Section 404 or earlier common law; the sole reason was to reduce the plan sponsor's costs irrespective of the adverse effect on the beneficiary to whom the fiduciary owed primary loyalty.

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The plan fiduciaries, particularly the EBC's, also took positions and represented interests adverse to the interests of beneficiaries as to plan matters in the state proceedings to assure recoupment of the plan sponsor's benefits, a violation of ERISA Section 404(a)(1)(A)(i) and Section 406(a)(1)(D) and (b)(2), 29 U.S.C. §§1104, 1106. Respondents successfully convinced petitioner Wilken that their integration threats made it futile and senseless for him to pursue his worker's compensation claim. Respondents intimated to petitioner Hechenberger that if he further pursued his worker's compensation claim he might even be required to pay $1,000 of prior benefit plan payments back to respondents.[9]

Petitioner Ramsey attempted to forestall his state claim from proceeding while respondents' conduct was being examined by the instant proceeding to assure he'd get prior federal review of his ERISA claims. After this instant suit was filed and petitioner Ramsey's worker's compensation case was pending, the Southwestern Bell respondents attempted to force him to a state hearing on the plan integration issues before the state agency where they knew *Strohmeyer, supra,* controlled, to give respondents in the instant case a res judicata defense they already raised as to petitioners' class request.[10] The respondent State Director threatened to go ahead and adjudicate.

Not even the Court of Appeals attributed respondents' abandonment announcements to any desire to cease their dual loyalties and adversarial representation, attributing the reason for abandonment solely to a change in Missouri law. Appendix A, p. A-4. Even now respondents do not abandon their dual loyalties but rather on summary judgment assert the plan fiduciaries have the right to reinterpret historical plan terms in derogation of any interests of the beneficiary and solely for the

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[9] Hechenberger deposition transcript pages 13-14, 28, 30; CR page 113.

[10] CR pages 58, 64-69.

interest of the employer notwithstanding ERISA Section 404 and common law loyalty obligations. See *United States v. W. T. Grant, Inc.*, 345 U.S. 629, 632 (1953) (case not moot if defendant free to return to old ways). Nor did respondents propose to abandon their position of plan administrators and fiduciaries; they continue to represent interests adverse to the beneficiaries as to plan issues in workers' compensation proceedings, to "recover" plan monies for the employer,[11] a clear violation of ERISA Section 406(a)(1)(D) and (b)(2), 29 U.S.C. §1106. For example, respondents still integrate plan benefits with state TTD benefits,[12] notwithstanding the Bell system hadn't earlier integrated such benefits if the EBC did not classify the accident as work related for plan purposes.[13]

Neither the district court nor the Eighth Circuit denied respondents' commission of acts revealing dual loyalties or improper adversarial representation, nor did either court suggest that petitioners suffered no damages. They only found no reduced state award. However, petitioners submit on these facts there should have been judicial consideration of fiduciary replacement as an available ERISA remedy. E.g., *Katsaros v. Cody,* 744 F.2d 270, 281 (2nd Cir. 1984) (removal of fiduciaries appropriate for violation of responsibility). Cf. *Powers v. Johnson,* 306 S.W.2d 616, 622-24 (Mo.App. 1957) (removal even though corpus of trust had not been jeopardized, where fiduciary served in an adversarial role to beneficiaries). ERISA §502(a)(3), 29 U.S.C. §1132, is broadly written as to equitable relief.

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[11] McGrath deposition transcript page 35, lines 5-15.

[12] CR page 137.

[13] Exhibit 46, page 2. Plan benefits can be far more generous if the accident is classified work related. Petitioner Wilken's injury was not classified by the EBC as work related under the plan.

This Court is now reviewing the question of broad remedies for fiduciary misconduct in *Massachusetts Mutual Life Ins. Co. v. Russell,* No. 84-9, 53 Law Week 3235. Limited abandonment under the foregoing circumstances and only when challenged and caught, close to the eve of trial, is no absolute cure for past and continuing disloyalty. The summary acceptance of abandonment under these circumstances, without review of respondents' total conduct, encourages the fiduciary buccaneerism the Ninth Circuit condemned and remedied in *Russell v. Massachusetts Mutual Life Ins. Co.,* 722 F.2d 482, 490 (1983), certiorari granted sub nom *Massachusetts Mutual Life Ins. Co. v. Russell, supra.*

The Eighth Circuit's summary affirmance avoids not merely the important *Amax Coal* and *Schneider Moving* dual loyalty issues, but it also avoids the related remedies issue this Court is about to review.

Petitioners submit the Eighth Circuit's finding of mootness solely because no reduced award had yet occurred, was too summary for the issues presented by petitioner in opposition to summary judgment. The issues of dual loyalty, EBC direction of adversarial representation, existence of non-benefit damages (as distinguished from any reduced state award) and fraudulent concealment, all supported by evidence before the district court and on summary judgment factually binding on respondents,[14] deserve consideration. For this reason petitioners submit that the petition be granted or the cause be returned to the Eighth Circuit for informative consideration, or that decision on this petition be held pending decision in *Massachusetts Mutual, supra.*

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[14] *Adikes v. S. H. Kress & Co.,* 398 U.S. 144 (1970) (petitioners as opponents to summary judgment entitled to favorable inferences from exhibits, testimony and affidavits). Below respondents argued *as if* there had been a trial with specific findings against petitioners.

II. Question: Does ERISA Protect Discouragees?

One damage question presented is whether a beneficiary suffers recoverable damage if he was too discouraged by respondents' misconduct to obtain what the lower courts mislabeled a "reduced" award.

Petitioner William Wilken suffered a compensable injury in 1976. Respondents then convinced both Wilken and his then counsel that even if he "won" in the worker's compensation proceeding on every other defense that respondents might choose to assert, petitioner Wilken still couldn't obtain a single penny because the integration credit they would be given by the state for prior benefit plan payments ($6,120.60) exceeded the "best" ($5,767.14) he could ever conceivably be awarded by the state.[15] For Wilken, "reduced" award means *no* award. Information about plan history concealed from the Missouri judiciary was also concealed from petitioner Wilken and his attorney. Wilken and his compensation lawyer were convinced no purpose would be served by petitioner continuing to pursue his state claim, that pursuit would be futile and expensive, leading to his voluntary dismissal.[16]

Respondents' abandonment doesn't help petitioner Wilken and those like him, for the abandonment comes too late. Wilken is barred by Missouri limitations from refiling for compensation, §287.430, R.S.Mo., and his request post-abandonment to reopen his state claim has been ignored by respondents.

Petitioner Wilken's barment is not affected by the recent Missouri statutory amendment. The September 28, 1983 change by the Missouri legislature to prohibit integration completely whether the benefit plan so allows or not, does not affect the

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[15] Exhibit 20.

[16] Wilken deposition transcript pages 33-34, 61-62.

petitioners who were all injured before that date. Date of injury determines which statutory version is to be used. *Evans v. Missouri Utilities Co., supra,* 671 S.W.2d at 813. Nor does the recent state legislative change now have any effect if these ERISA plans truly permitted the contested integration as respondents still insist is now the case under their reinterpretations. *Alessi v. Raybestos-Manhattan, Inc., supra; Shaw v. Delta Airlines,* ____ U.S. ____, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983).

The district court held discouragees who do not exhaust the state administrative procedure the respondents had previously assured them would be futile, cannot be "actually injured." They have no case or controversy. As a matter of law, then, they can suffer no other extracontractual damages. That is the import of the Eighth Circuit's finding that: "None of the named plaintiffs had been subjected to the integration practice in a compensation proceeding . . .," and that only beneficiaries "who were actually subjected to an offset" can bring an action. Appendix A, p. A-4. The effect of this is to insist that physically injured beneficiaries proceed to try their state claim on all contested issues even though respondents had actively assured them (as Wilken) in advance they would wind up with *nothing* because of the integration threat.

In *Teamsters v. U.S.,* 431 U.S. 324, 365-67 (1977), this Court said it wasn't necessary for protected workers to pursue futile efforts:

> "A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.
>
> If an employer should announce his policy of discrimination by a sign reading 'Whites Only' on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to per-

> sonal rebuffs. the same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices—by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his workforce from which he has discriminatorily excluded members of minority groups. When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.
>
> * * *
>
> "Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups. ... Such a per se limitation on the equitable powers granted to courts by Title VII would be manifestly inconsistent with the 'historic purpose of equity to 'secur[e] complete justice' and with the duty of courts in Title VII cases 'to render a decree which will so far as possible eliminate the discriminatory effects of the past.' [citation omitted]."

Petitioners Wilken and Hechenberger were told by those who administered the benefit plans that the pursuit of the state claim would be futile because the integration claim exceeded the "best" they could otherwise obtain from the state. It would be worse than futile, for if the injured worker went to hearing he would be saddled with the expenses of trying his state claim, especially the few hundred dollars cost of presenting expert medical testimony on the extent of residual disability. Petitioner Hechenberger was even subtly threatened with the possiblity of paying back some $1,000 in "excess" plan payments. And what

attorney would be willing to represent an injured worker for a contingent fee if he knew in advance there could be no recovery due to the integration?

The Eighth Circuit's requirement that before physically injured beneficiaries are given Congressionally mandated "ready access" to the federal courts[17] to protest plan violation and seek removal of the fiduciaries for dual loyalties and adversarial representation (and damages therefrom), they must first pursue their state claims that all respondents had previously assured them would be futile and result in no award (while at the same time concealing plan history), forces beneficiaries to unnecessarily "deplete energy and resources" for no apparent reason. This Court has said even able-bodied workers should not be required to engage in efforts that wouldn't give full relief. *Clayton v. United Auto Workers,* 451 U.S. 679, 693 n.22 (1981).

Petitioners urge as basis for granting the writ that the rejection of the discouragement doctrine for ERISA beneficiaries, has important national overtones. ERISA cases are trust cases. *Schneider Moving & Storage Co. v. Robbins, supra.* The lower courts' decisions mean the loyalty requirements under common law and ERISA Sections 404 and 406, 29 U.S.C. §§1104, 1106, which this Court said in *Amax Coal, supra,* must be enforced with "uncompromising rigidity," 453 U.S. at 330-34, permit the fiduciaries to threaten wrongful integration and engage in concealment with relative impunity if, as in petitioner Wilken's case, the beneficiary permits himself to become discouraged for too long a time under state law.

Below respondents argued that the discouragement doctrine should be limited to civil rights cases and not extended to protect ERISA beneficiaries from fiduciary misconduct. This is an important question, as important as it was in *Teamsters, supra.* Petitioners submit that Congress intended broader protection of

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[17] ERISA §2(b), 29 U.S.C. §1001(b).

employees than simply in civil rights cases. This Court in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), and in *Schneider Moving, supra,* recognized workers are a specially protected class as plan beneficiaries. To say ERISA discouragees have no claim for damages or equitable relief resulting from dual loyalties of the fiduciary, is to reject protection for part of a protected class. Congressional language in ERISA §502(a)(3)(B) is certainly as broad as Title VII as to equitable remedies. Petitioners submit that the Eighth Circuit's summary refusal to adopt or to even consider the *Teamsters* doctrine to allow remedy to ERISA participants and beneficiaries too-long discouraged by wrongful threats to integrate plan benefits, merits review by this Court.

III. Question: Does ERISA Allow Extracontractual Compensatory Remedies?

The third question sought to be reviewed goes to other extracontractual damages than those arising from discouragement. This Court recently granted certiorari to review the entire issue of ERISA damages arising out of alleged fiduciary misconduct in *Massachusetts Mutual Life Ins. Co. v. Russell, supra.* This Court will also be reviewing the question of damages from fiduciary misconduct in only a slightly different context in *Allis-Chalmers Corp. v. Lueck,* No. 83-1748, 53 Law Week 3235. Respondents' misconduct and disloyalty is no less offensive than in those two cases granted review; respondents' fraudulent concealment makes their conduct far more officious.

Petitioners suffered other losses than benefits. In the instant proceeding all petitioners had to lose time from work, and thereby wages or its equivalent, to attend their depositions taken by respondents. Depositions were of record. Petitioners Hechenberger and Ramsey also lost wages or equivalent attending the state administrative proceedings at which they were frustrated because of the integration threats made at the time. Had respondents not made their wrongful threats and engaged

in acts of disloyalty to the beneficiaries, petitioners Ramsey and Hechenberger would have resolved their state claims a long time prior to abandonment without any attorney representing either in the state proceeding. Notwithstanding the limited abandonment, Ramsey has now suffered and Hechenberger will suffer a reduction in the PPD awards because of the state mandate calling for attorney fees to be paid out of the worker's award. §287.260, R.S.Mo. Petitioners offered evidence attorneys would not have otherwise been retained in such state proceedings but for respondents' threats.[18]

On their state compensation claim petitioners Ramsey and Hechenberger also had to wait until respondents abandoned their threats to integrate with PPD awards, and this did not occur until some year and a half after the instant suit was filed. Petitioner Ramsey would have resolved his state claim before this suit was instituted except for the integration threat. Hechenberger would have otherwise resolved his claim and accepted respondents' earlier $8,000 evaluation (before integration), long before the abandonment was announced. The *amount* of the credit claim was never in issue, so that ordinarily prejudgment interest should be allowable under ERISA for this delay.

In *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks,* ____ U.S. ____, 80 L.Ed.2d 428, 438 (1984), this Court stated claims for interest survive the abandonment of the challenged conduct

> "There is some question as to whether petitioners' challenge to the rebate program is properly before us. In 1980, within a month of the entry of the District Court's judgment, the union was decertified as the bargaining representative of Western Airlines' clerical employees.

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[18] Below respondents confused attorneys' fees for this ERISA litigation with separate attorney's fees for representation in work comp proceedings.

> Thus, none of the petitioners is presently represented by the union or required to pay dues to it. Petitioners' claim for an injunction against the rebate scheme would therefore appear to be moot. But petitioners also sought money damages, and damages for an illegal rebate program would necessarily have been in the form of interest on money illegally held for a period of time. That claim for damages remains in the case. The amount at issue is undeniably minute. But as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot., *Powell v. McCormack,* 395 U.S. 486, 496-498 (1969)."

In essence, by respondents' threats and the necessity of delaying the work comp resolution until abandonment, respondents were in effect holding up payment of moneys owing to petitioners to the extent of the amount of the challenged credit claim for prior plan benefits paid for the temporary absences. Only non-beneficiaries were enriched by this delay caused by respondents' prior threats. Petitioners submit if the *Ellis* plaintiffs' claims were not mooted by that union's abandonment of further alleged misconduct against them or because of lack of magnitude of the amount or lack of specificity in the damage portion of the pleading,[19] respondents' abandonment in the instant case should not prevent recovery for the interest due the petitioners.

Denying by summary judgment without any discussion all extracontractual damages to petitioners who both challenged the respondents' dual loyalties and sought discovery of information the fiduciaries had theretofore concealed from them, encourages respondents to engage in fiduciary irresponsiblity, for the plan administrators know that if "caught" the worst that

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[19] *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, supra,* 80 L.Ed.2d at 438 n.5. See also Rule 54(c), Federal Rules of Civil Procedure.

will happen is that they will have to abandon their wrongful conduct without recompense for consequential losses, interest and ordinarily non-taxable litigation expenses. Moreover, the respondents will be so very much "ahead" for all the time-barred discouragees such as petitioner Wilken.

This view of damages by the Eighth Circuit, limited solely to the promised benefit no matter the harm, is in conflict with the Ninth Circuit's decision in *Russell v. Massachusetts Mutual, supra.* The Ninth Circuit said

> "In referring to compensatory damages necessary to make a party whole, we are not referring merely to contractual damages for loss of plan benefits. Rather, section 1109 provides for relief that will compensate the injured party for all losses and injuries sustained as a direct and proximate cause of the breach of the fiduciary duty. A contrary reading would conflict with the language of the statute and provide little encouragement to fiduciaries to abide by the act, since the most that could be forfeited in the event of misconduct would be benefits already owed by the plan. More important, a fiduciary could ignore or unreasonably perform its duties and responsibilities with respect to the disposition of claims with virtual impunity and at the sole cost of the participant who has suffered harm as a result of such misconduct. We believe that Congress did not intend to afford such fiduciary immunity." 722 F.2d at 490.

Petitioners submit their third question presents another aspect of the extracontractual damage issue most analogous to that to be reviewed by this Court in *Massachusetts Mutual, supra,* and for that reason the writ should be granted or alternatively this petition held for decision until this Court decides *Massachusetts Mutual.*

CONCLUSION

Petitioners respectfully pray that the Supreme Court issue a Writ of Certiorari to the Eighth Circuit Court of Appeals in the herein matter to review the issues presented herein or alternatively remand for further consideration in light of *Amax Coal* and *Schneider Moving, supra,* or alternatively hold this petition pending decision in *Massachusetts Mutual, supra.*

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2266

Richard A. Hechenberger, *Appellant*

William V. Wilken; Charles W. Ramsey,
Appellants

v.

Western Electric Co., Inc.; Western Electric Plan for Employees' Pensions, Disability Benefits and Death Benefits, now also known in part as Western Electric Sickness and Accident Disability Benefit Plan, Western Electric Co., Inc., Plan Administrator,
Appellees,

Southwestern Bell Telephone Co., Inc., Southwestern Bell Telephone Plan for Employees' Pensions, Disability Benefits and Death Benefits, now also known in part as Southwestern Bell Telephone Sickness and Accident Disability Benefit Plan, Southwestern Bell Telephone Co. Plan Administrator,
Appellees

v.

Richard Rousselot, Director,
Division of Workers Compensation,
State of Missouri,

Appellees.

Appellees.

Appeal from the United States
District Court for the Eastern
District of Missouri.

Submitted: June 11, 1984

Filed: August 28, 1984

Before ROSS, Circuit Judge, HENLEY, Senior Judge, and BOWMAN, Circuit Judge.

ROSS, Circuit Judge.

This appeal arises from an action filed by three employees against their employers, Western Electric Co., Inc., and Southwestern Bell Telephone Co., Inc., and the companies' respective disability benefit plans. The employees challenge a practice followed by the companies in Missouri Workers' Compensatin proceedings, of offsetting certain workers' compensation awards with amounts paid under the disability benefit plans.[1] The employees also claimed that the Missouri statute which authorized the integration of benefits was preempted by the Employee Retirement Income Security Act (ERISA), 29

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[1] The practice of offsetting workers' compensation awards by the amounts paid under a benefit plan is commonly referred to as "integration."

U.S.C. § 1001 *et seq.* Due to an intervening change in state law, and the defendants' abandonment of their integration policies, the district court[2] held that the claims were moot and granted the defendants' motions for summary judgment. On appeal the employees challenge the court's ruling on the mootness issue. We believe that the substantive issues in this case are moot, accordingly we affirm the judgment of the district court.

Discussion

The employees claimed that the Missouri statute which authorized the integration practices was preempted by ERISA. The state statute provided:

> The employer shall be entitled to credit for wages paid the employee after the injury, and for any sum paid to or for the employee or his dependents on account of the injury except for liability under section 287.140.

MO. ANN. STAT. 287.160(3) (Vernon 1965).[3] The Missouri courts had approved the integration practice. *See Strohmeyer v. Southwestern Bell Telephone Co.,* 396 S.W.2d 1 (Mo. Ct. App. 1965). *See also Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 516 (1981) (compensation awards allowed to offset pension benefits). While this action was pending in the district court, the State of Missouri amended its statute to provide:

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[2] The Honorable William C. Hungate, United States District Judge for the Eastern District of Missouri.

[3] This section was amended in 1981 to provide:

> The employer shall be entitled to credit for wages paid to the employee or his dependents on account of the injury or death if such wages were not earned for work performed by the employee after the injury or death.

This modification is not significant for purposes of this appeal.

> The employer shall not be entitled to credit for wages or such pay benefits paid to the employee or his dependents on account of the injury or death.

MO. ANN. STAT. 287.160.3 (Vernon Supp. 1984). Accordingly, the state statute no longer authorized the integration/offset practice.

Upon learning of the change in the state statute the defendants abandoned their practice of claiming offsets in workers' compensation proceedings. Each defendant filed affidavits in the district court stating that they would not claim such offsets against the plaintiffs, nor any other employees with claims pending in workers' compensation proceedings. None of the named plaintiffs had been subjected to the integration practice in a compensation proceeding, *see Wilken v. Southwestern Bell Telephone Co.,* No. 82-0145C(3) slip op. at 2-3 (E.D. Mo. Oct. 17, 1983), nor was there any potential that they, or others, would be subjected to this practice in the future. On this basis the court correctly granted the defendants' motions for summary judgment; the employees' claims were moot.

The normal rule is that when claims of the named plaintiffs are moot before class certification dismissal of the action is required. *See Board of School Commissioners v. Jacobs,* 420 U.S. 128 (1975); *Inmates of the Lincoln Intake and Detention Facility v. Boosalis,* 705 F.2d 1021 (8th Cir. 1983). The employees seek to rely on the "relation back" doctrine to save their claim from mootness. The relation back doctrine provides that where the controversy involving the named plaintiffs becomes moot prior to class certification, the certification can relate back to the filing of the complaint. *See Sosna v. Iowa,* 419 U.S. 393, 402 n.11 (1975). Whether the doctrine should be applied depends upon whether "the issue would evade review." *Id.* Here, there is nothing to prevent an employee who was actually subjected to an offset, prior to the amendment of the state statute, from bringing an action to challenge the former

practice.[4] Accordingly, there is nothing to indicate that the issue will "evade review." *See Bradley v. Housing Authority,* 512 F.2d 626, 629 (8th Cir. 1975). We see no reason why the normal rule requiring dismissal should not apply in this case.

Accordingly, the judgment of the district court will be affirmed.[5]

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[4] Precisely such an action is currently pending in the United States District Court for the Eastern District of Missouri, and is docketed as *Clemens v. Southwestern Bell Telephone Co.,* No. 84-0756C(3). Class certification has been requested in that case.

[5] The appellants argue that the case is not moot as they are entitled to attorney's fees and litigation expenses under 29 U.S.C. § 1132 (West Pamphlet 1984) because they successfully prompted the defendants to change their policies. We believe this demand for fees should be presented to the district court in the form of a fee request; it does not save the case from mootness.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2266-EM. September Term, 1984

RICHARD A. HECHENBERGER, *Appellant*

WILLIAM V. WILKEN, ET AL.,
Appellants

VS.

WESTERN ELECTRIC CO., INC., ET AL.,
Appellees,

SOUTHWESTERN BELL TELEPHONE CO., INC.
ET AL.,
Appellees

VS.

RICHARD ROUSSELOT, ETC., ET AL.
Appellees

Appeal from the United States
District Court for the
Eastern District of Missouri

Appellants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 12, 1984

APPENDIX C

29 U.S.C. § 1001

Ch. 18

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 § 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to section 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

* * *

29 § 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

* * *

(D) transfer to, or use by or for the benefit of a party in interest, of any assets of the plan; or

* * *

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

* * *

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

* * *

29 § 1144. Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * *

Rule 54, FRCP

(c) Demand for Judgment.

Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

* * *

R.S.Mo. § 287.260

287.260 Compensation to have priority—not assignable— exceptions. . . . the division or the commission may allow as lien on the compensation, reasonable attorney's fee for services in connection with the proceedings for compensation if the services are found to be necessary and may order the amount thereof paid to the attorney in a lump sum or in installments. All attorney's fees for services in connection with this chapter shall be subject to regulation by the division or the commission and shall be limited to such charges as are fair and reasonable and the division or the commission shall have jurisdiction to hear and determine all disputes concerning the same.

* * *

R.S.Mo., § 287.430

287.430. Limitation as to action—exception.—No proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death. The filing of any form, report, receipt, or agreement, other than a claim for compensation,

shall not toll the running of the periods of limitation provided in this section. The filing of the report of injury or death three years or more after the date of injury, death, or last payment made under this chapter on account of the injury or death, shall not toll the running of the periods of limitation provided in this section, nor shall such filing reactivate or revive the period of time in which a claim may be filed. In all other respects the limitations shall be governed by the law of civil actions other than for the recovery of real property, but the appointment of a guardian shall be deemed the termination of the legal disability from minority or incompetency. The statute of limitations contained in this section is one of extinction and not of repose.